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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 701

In the Matter

—of—

BUDDY LYNN WHITTINGTON

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, FAIRFIELD COUNTY

REPLY BRIEF FOR THE PETITIONER

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The best characterization of the facts in this case has been given by the National Council of Juvenile Court Judges (hereinafter "National Council") in its Brief Amicus Curiae:

> "The record sets one's teeth on edge." Brief of the National Council, p. 28.

As the National Council also states:

> "The shameful confinement of the appellant is contrary to the standards prescribed in the Guides for Juvenile Court Judges promulgated by the National Council many years ago and cannot be condoned. We do not

> seek by our arguments in this brief to excuse it, but we cannot undo it, however strong our desires to do so may be." *Id.*, p. 2.

Unlike the National Council—and respondent—we believe that this Court can and should undo this "shameful confinement" and reverse the judgment of delinquency against petitioner. In this Reply Brief, we will address ourselves primarily to the procedural objections interposed by respondent and the National Council, which are illusory. On the merits of the constitutional issues we wish merely to correct certain apparent misconceptions of respondent and the National Council and to bring to this Court's attention several important new cases in support of our position, decided since our original Brief was written.

I.

The Delinquency Adjudication of the Juvenile Court Is a Final Judgment Reviewable by This Court.

Respondent claims that there is no final appealable order in this case. Brief for the Respondent, pp. 16-22. It is clear, however, that the judgment of the Juvenile Court adjudicating petitioner a delinquent child and committing him to the custody of the Ohio Youth Commission (A. 54) has the requisite finality for review by this Court under 28 U.S.C. § 1257.

"The most pertinent source of inquiry as to finality, outside of the judgment and opinion, is the law of the state wherein the judgment was rendered." Stern & Gressman, *Supreme Court Practice*, § 3-9, p. 75 (3rd edit. 1962).

The relevant Ohio statute makes the judgment against petitioner appealable. Ohio Rev. Code Ann. § 2501.02 provides that the Ohio Court of Appeals shall have jurisdiction:

> "Upon an appeal upon questions of law to review, affirm, modify, set aside or reverse judgments or final orders of courts of record inferior to the Court of Appeals within the district, *including the finding, order or judgment of a juvenile court that a child is delinquent,* neglected or dependent for prejudicial error committed by such lower court;" (emphasis supplied).

The District Court of Appeals of Ohio held in this case that the judgment against petitioner is a final appealable order under this statute. It specifically overruled respondent's motion to dismiss the appeal for lack of a final order (A. 249-251). Respondent raised the same objection in opposing petitioner's appeal in the Supreme Court of Ohio. Memorandum of Plaintiff-Appellee Contra Motion in Support of Jurisdiction, pp. 20-21. In dismissing the appeal, however, the Supreme Court of Ohio did so for lack of a substantial constitutional question, not for any jurisdictional reason or lack of finality in the judgment[1] (A. 274).

This judgment also has the necessary incidents of finality under the prior decisions of this Court construing its own jurisdictional statutes. This Court "has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered 'final.'" *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 306 (1962). It has

[1] This Court granted certiorari despite respondent's reiteration of the claim that the judgment lacked finality. Respondent's Brief in Opposition to Petition for Certiorari, pp. 20-21.

looked to the precise impact of the judgment on individuals and their rights.

The impact of the judgment adjudicating petitioner delinquent was immediate and enormous. It labeled him with the stigma of having committed murder, since this charge was the sole basis for the delinquency adjudication. It operated on him coercively, since it ordered him committed to the custody of the Ohio Youth Commission. Under the law of Ohio, whether the order of commitment is temporary or permanent, the right to physical custody of a committed child passes from his parents to the Youth Commission. Ohio Rev. Code Ann. § 5139.05(B).[2]

Determinations with far less drastic consequences than this one have been held to present the requisite finality for review by this Court. Thus this Court held reviewable the certification of a collective bargaining representative by a state labor relations board, sustained by the state courts, "although it did not itself command action but . . . was enforceable only by another proceeding." *LaCrosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U.S. 18, 23 (1949). This Court emphasized that the administrative determination "fixes a status to which Wisconsin provides a sanction," the determination was "not an abstract determination of status," and it "established legal rights and relationships." *Id.*, 336 U.S. at 22, 24.[3]

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[2] The judgment of delinquency—although it does not "impose any of the civil disabilities ordinarily imposed by conviction," *id.* § 2151.35—may be considered by any court in a future criminal proceeding against the individual with respect to sentencing and probation. *Id.*

[3] "[D]eclaratory judgments are final, although the judgment is itself not coercive." Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 37, p. 71 n. 1 (1951); see *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249 (1933).

A fortiori, this is true of the judgment in the present case, which affixed this juvenile's status as a delinquent and operated coercively on him.

Respondent's contention that the judgment is not final because of the power of the Juvenile Court to certify an adjudicated delinquent for trial as an adult will not withstand analysis. The juvenile delinquency proceeding and an adult prosecution are separate proceedings. This Court has held finality to arise from numerous judicial proceedings which are connected with or even incidental to another proceeding:

> "In proceedings in prohibition, habeas corpus, coram nobis, mandamus, and quo warranto, it is sufficient, for purposes of review by the Supreme Court, if the judgment of the highest court of the state finally determines the right of the petitioner to the writ sought, *These proceedings are considered as independent, even when in fact incidental to some other proceeding.*" Robertson & Kirkham, *supra,* § 36, pp. 69-70.[4]

Nor does the possibility of some other type of disposition order by the Juvenile Court deprive the present judgment of finality. The Ohio statute authorizing appeal from such judgments and the decision of the District Court of Appeals holding the judgment in this case final and appealable are based on a sound appreciation of the nature

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[4] Thus, in *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63 (1928), this Court held that a defendant who sought habeas corpus on federal constitutional grounds prior to trial could receive Supreme Court review, in advance of his trial on the criminal charge, of the refusal to discharge him. This Court said:

> "the proceeding was independent, adversary, and both adapted and directed to the enforcement of a most important personal right." 278 U.S. at 71.

of juvenile court proceedings and the need to provide effective review of a delinquency adjudication.

There is nothing tentative or hypothetical about the adjudication of delinquency or the consequences we have described. On the other hand, juvenile courts, once an adjudication of delinquency is made, have a continuing supervisory jurisdiction over the juvenile. See Bowman, *Appeals from Juvenile Courts*, 11 Crime & Delinquency 63, 72-73 (1965). Under the Ohio Code, § 2151.38, for example, the juvenile court may make temporary commitments for designated periods, or up to the age of 21, and may modify its orders from time to time.

The juvenile court is thus unlike a criminal court, which sentences a criminal defendant and does not maintain continuing supervisory jurisdiction over him.[5] It would be unrealistic to carry over principles of finality derived from criminal cases to juvenile dispositions. Since certainty of ultimate disposition comparable to the criminal sentence does not exist because of the continuing jurisdiction of the juvenile court, appeal might be indefinitely deferred until it was ineffective.[6] *Cf. Brown Shoe Co.* v. *United States*, 370 U.S. 294, 306-309 (1962).

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[5] In adult criminal cases, sentence is held to be the judgment and to create the finality necessary for review. *Berman* v. *United States*, 302 U.S. 211, 212 (1937).

[6] *Cf.* Calif. Welf. & Inst'ns Code, § 800:

> "A judgment or decree of a juvenile court . . . assuming jurisdiction and declaring any person to be a person [who has violated a criminal statute] . . . may be appealed from in the same manner as any final judgment . . . ."

II.

The Proceedings in the Juvenile Court Were an Adjudicative Hearing, Not a Preliminary Hearing.

Respondent and the National Council urge that the proceeding in the Juvenile Court was in the nature of a preliminary hearing to bind petitioner over for trial as an adult, rather than an adjudicative hearing on the delinquency charge. Brief for the Respondent, pp. 19-21; Brief for the National Council, pp. 5-8. Such a contention is contrary to the facts of the record, untenable under the Ohio statutes, and inconsistent with the position taken by respondent below.

Everyone treated the proceeding in the Juvenile Court as a trial of the charge of juvenile delinquency. The complaint alleges that petitioner is a delinquent child (A. 12). Petitioner was arraigned on the charge of delinquency, he was required to plead to it, and he pleaded "not guilty" (A. 28). The Juvenile Court set "trial of this cause" for September 2, 1966 (A. 41). At the outset of the proceeding on September 2, the judge said: "We're here this morning for a trial of the facts" (A. 114). The Court's journal entry of the proceeding recites that the Court "finds that said Buddy Lynn Whittington is a minor under the age of eighteen years, fourteen years of age, and is a delinquent child as set forth in the complaint" (A. 54).

The District Court of Appeals treated and decided the case as an appeal from a judgment adjudicating petitioner's delinquency. The very first sentence of its opinion states:

"This is an appeal by Buddy Lynn Whittington from a judgment of the Juvenile Court finding him to be a delinquent child" (A. 255).

The Court of Appeals further stated:

> *"Buddy Lynn Whittington having been tried by the Juvenile Court as an alleged delinquent and not under the criminal statutes,* and the burden of proof being by a preponderance of the evidence, we do not find the judgment of the Juvenile Court finding Buddy to be a delinquent child to be either against the manifest weight of the evidence of contrary to law. We find no violation of his constitutional rights and no error prejudicial to him. Neither do we find the Juvenile Code to be unconstitutional" (A. 271). (Emphasis supplied.)

No one has even suggested before that the proceeding below was anything but an adjudicative hearing on delinquency, or that the constitutional questions presented by this record can be avoided by treating the proceeding as a probable cause hearing. Indeed, respondent in the courts below and in opposing the petition for certiorari, took a directly opposite view—that the Juvenile Court's statement about probable cause should be disregarded and that the Juvenile Court's journal entry finding petitioner to be a delinquent child should control.[7]

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[7] See Respondent's Answering Brief in the District Court of Appeals, p. 25; Memorandum of Plaintiff-Appellee Contra Motion in Support of Jurisdiction in the Supreme Court of Ohio, pp. 10-11; Respondent's Brief in Opposition to Petition for Certiorari in this Court, pp. 10-11.

Indeed, respondent appears to contradict both itself and the National Council in its own Brief in this Court, since it still urges

Contrary to the novel contention now advanced, the Ohio juvenile code clearly and unambiguously requires an adjudication of delinquency before the question of certifying a juvenile for trial as an adult arises. Certification is one form of disposition of an already adjudicated delinquent, as is apparent from the face of Ohio Rev. Code Ann. § 2151.26:

> "In any case involving a *delinquent child* under sections 2151.01 to 2151.54, inclusive, of the Revised Code, *who has committed an act which could be a felony if committed by an adult,* the juvenile judge, after full investigation and after a mental and physical examination of such child has been made by the bureau of juvenile research, or by some other public or private agency, or by a person qualified to make such examination, may order that such child enter into a recognizance with good and sufficient surety, subject to the approval of the judge, for his appearance before the court of common pleas at the next term thereof, for such disposition as the court of common pleas is authorized to make for a like act committed by an adult; or the judge may exercise the other powers conferred in such sections in disposing of such case." (Emphasis supplied.)

Respondent and the National Council, in trying to treat the adjudicative hearing in the present case as a probable cause hearing, are in effect asking this Court to rewrite the statute to make the passages emphasized above read

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this Court, in passing on the standard of proof question, to disregard the Juvenile Court's language about probable cause and look solely to the journal entry. Brief for the Respondent, pp. 47-48.

"an *alleged* delinquent child," "who is *alleged* to have committed an act which could be a felony if committed by an adult."

It is also plain from the last sentence of § 2151.26, *supra*, that respondent's construction of the statute is untenable. In authorizing the judge to "exercise the other powers conferred in such sections in disposing of such case," the statute must be referring to § 2151.35, which is the section dealing with disposition. Section 2151.35 unequivocally provides:

> "*If the court finds that the child is a* juvenile traffic offender or is *delinquent,* neglected, or dependent, it may by order entered proceed as follows:
>
> [There follow the dispositional powers conferred on the Juvenile Court]" (emphasis supplied).

A finding of delinquency in an adjudicative hearing thus must precede any dispositional action by the Juvenile Court, including certification for trial as an adult. Justice Bell of the Supreme Court of Ohio has described the operation of § 2151.26 in exactly this way:

> "Let us examine the procedure to be followed under these statutes. A juvenile is arrested and charged with the crime of rape. Under Section 2151.25, such juvenile must be brought before the Juvenile Court. Then, under Section 2151.26, provided such juvenile is found to be a delinquent, the juvenile judge may order him to appear before the Court of Common Pleas. But, first, the juvenile must be found to be delinquent. And this can be done only after a hearing.

> It is only after this finding of delinquency that the juvenile judge may exercise some discretion. He may dispose of the matter by committing the juvenile to the appropriate correctional school, release him, or 'bind him over,' so to speak, to the Court of Common Pleas." *State* v. *Worden*, 162 O.S. 593, 597-98, 124 N.E.2d 817 (1965) (dissenting opinion).[8]

Indeed, respondent seems to concede as much at another point in its Brief when it states:

> "Under the statutes of the Juvenile Code of Ohio, no child can be convicted of any crime unless and until he has been found to be a delinquent child by the Juvenile Court, and only then when the act committed would have been a felony if committed by an adult . . . ." Brief for the Respondent, p. 40.

The National Council states, at page 7 of its Brief, that if the Ohio statute is read as plain English requires it must be, the statute creates a double jeopardy bar to certification and subsequent trial as an adult. Such a contention affords no authority for this Court to construe a state

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[8] The dissent was on another point in the case, and there is no indication that the majority had any disagreement with his construction of the statute on the point with which we are here concerned.

Oklahoma has a statute similar to Ohio's on certification, Okla. Stat. tit. 10, § 112 (1966). The Oklahoma Court of Criminal Appeals has held that a proceeding like that in the present case is a delinquency hearing, not a preliminary hearing preparatory to certification, because the adjudication of delinquency is a prerequisite to valid certification. *Ex parte Lewis*, 85 Okla. Cr. 322, 188 P. 2d 367, 381 (1947).

statute contrary to its plain meaning. The question of double jeopardy is not before this Court in this proceeding.[9]

If the proceeding in the Juvenile Court were now to be construed by this Court as a probable cause hearing directed to certification, rather than an adjudicative hearing on the delinquency charge, an equally serious constitutional problem would be presented. The principle of fair notice established by this Court in *In re Gault,* 387 U.S. 1, 31-34 (1967), would surely require that an accused juvenile, his parents, and counsel receive notice of the nature of a hearing that can have such "tremendous consequences," and is a " 'critically important' " stage of juvenile proceedings, *Kent* v. *United States,* 383 U.S. 541, 554, 556 (1966). The notice here was of an adjudicative hearing on the merits of the delinquency charge, the case was tried on that basis, and has been reviewed on that basis. The fair notice required by *Gault* would be absent if this were now treated as a probable cause hearing.

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[9] The question whether a finding of delinquency bars a certification and a subsequent adult trial is one on which courts have differed in the few cases to consider the point, and it must be deemed unresolved. Compare *United States* v. *Dickerson,* 168 F.Supp. 899 (D. D.C. 1958), *rev'd on other grounds,* 271 F.2d 487 (D.C. Cir. 1959), with *Johnson* v. *State,* Maryland Court of Special Appeals, decided February 14, 1968, 2 Crim. L. Rep. 2411. See generally Sheridan, *Double Jeopardy and Waiver in Juvenile Delinquency Proceedings,* Federal Probation, December, 1959, pp. 43-47.

III.

Petitioner's Constitutional Rights Were Violated in the Proceedings Below.

(a) *Standard of Proof*—We note that the National Council makes little effort to defend the "preponderance of the evidence" test applied by the District Court of Appeals to uphold the judgment, other than to suggest that the differences between the civil and criminal standards are "rather subtle," Brief of the National Council, p. 14. If this is intended to suggest that the difference is not substantial or of practical importance, we submit that every lawyer who has tried cases in court would disagree. Proof beyond a reasonable doubt in Ohio means proof which brings about "an abiding conviction to a moral certainty of the truth of the charge." Ohio Rev. Code Ann. § 2945.04. This is a significantly greater burden than the "preponderance" test.

The National Council appears to prefer the "clear and convincing" test, on the theory that Juvenile Court jurisdiction originated in chancery and "clear and convincing" evidence is an accepted standard in equity. As we point out in our Brief, under either the "reasonable doubt" or the "clear and convincing" standard, the judgment against petitioner must be reversed. Brief for petitioner, pp. 50, 54-56. We continue to believe, as the Supreme Court of Illinois recently held in *In re Urbasek,* now reported at 232 N.E.2d 716 (1968), that the "reasonable doubt" standard is to be preferred in a serious law violation case. Chancery practice, as this Court made clear in *Gault,* is an unreliable guide to determining procedures in juvenile

courts; the doctrine of *parens patriae* may have originated in chancery, but "its historical credentials are of dubious relevance" in dealing with constitutional rights. 387 U.S. at 16.

(b) *Impartial Trier of Fact*—(i) The National Council asserts, without citation of authority, that it is a common practice, even in District Courts of the United States, for a judge who issues a search or arrest warrant to preside at the trial of the person searched or arrested. Brief of the National Council, p. 17. Even if this were assumed to be so, it would not uphold the Juvenile Court judge's participation in the investigatory and accusatory phase of this case as shown by this record. The point is that in trials in the District Courts of the United States, in all save "petty offenses," there is a constitutional right to an independent and impartial trier of fact, a jury. The Ohio Code affords no such right, and the Juvenile Court judge here acted as sole trier of fact.[10]

Respondent asserts that there is nothing in the record to show that the Juvenile Court judge knew of the "evidence" in the case prior to the adjudicative hearing. Brief for the Respondent, p. 35. The record clearly establishes that *facts* about the case—"the investigation, the kind of investigation, who was involved" (A. 121)—were confided by the probation officer to the judge prior to adjudication; whether or not the details of the "evidence"—the means

[10] There is no need, even in a one-judge jurisdiction, for the Juvenile Court judge to perform such functions as issuing arrest warrants. This Court has held that the function of determining that a person shall be arrested need not "be confided to a strictly judicial officer or tribunal;" it may be delegated to a prosecuting official. *Ocampo* v. *United States*, 234 U.S. 91, 100 (1914).

by which facts are proved at a trial—was confided is immaterial to the danger of prejudgment arising from this practice.

The National Council is mistaken in asserting that we contend it is "constitutionally impermissible" for a probation officer to conduct "any investigation before trial." Our position on this point is essentially that of the framers of the proposed Uniform Juvenile Court Act, who provide:

> "After a petition has been filed under this Act, and at such time as the court may direct, a social study and report to the court in writing shall be made by the [probation officer] of the court . . . concerning the child, his family, his environment and other matters relevant to the disposition of the case, *except that if the allegations of the petition are denied by a party . . . the investigation and report shall not be made until the court finds, after a hearing on the petition pursuant to this Act, that the child is delinquent. . . .*" National Conference of Commissioners on Uniform State Laws, Second Tentative Draft, Uniform Juvenile Court Act, p. 31 (1967).

See also Children's Bureau, HEW, *Standards for Juvenile and Family Courts*, pp. 13, 54-55 (1966).

What we do contend is that in a contested law violation case like the present, the probation officer, as an arm of the Juvenile Court, should not act as a composite policeman, prosecutor, and witness against the juvenile, as the probation officer did in this case.[11]

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[11] Contrary to the suggestion of the National Council, pp. 18-19 of its Brief, timely objection to the Ohio practice was made in this case prior to adjudicative hearing, by motion to dismiss the proceeding (A. 42).

(ii) On March 5, 1968, a three-judge Federal Court in the Southern District of New York held that the Federal Juvenile Delinquency Act, 18 U.S.C. § 5033, is unconstitutional insofar as it denies a jury trial to an accused juvenile delinquent charged with violating a federal criminal statute. *Nieves* v. *United States*, 67 Civ. 2399. Judge Tyler wrote:

> "The right to a jury trial is available in all non-petty federal criminal prosecutions. U.S. Const. amend. VI. Notwithstanding the fact that the FJDA seems to indicate that federal juvenile court proceedings are not to be considered criminal, 18 U.S.C. § 5032 (1964), we read *Gault* to require the availability of that right in any federal juvenile proceeding in which a youth is faced with incarceration for the commission of an act alleged to be violative of federal law. It is clear to us that an FJDA proceeding which may lead to a juvenile's loss of liberty by incarceration, for purposes of the Sixth Amendment right to trial by jury, is in nature a criminal prosecution, and the constitutionally guaranteed right of a trial by jury in all federal criminal prosecutions must, therefore, accompany such a proceeding." Opinion, pp. 33-34.[12]

The Family Court of Rhode Island has also recently held the right of jury trial applicable in a delinquency case in

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[12] The Court also held that the Act was not saved by the juvenile's right to choose an adult criminal trial instead of a juvenile delinquency proceeding and thus obtain his jury trial. *Id.*, p. 24.

It further emphasized that it was dealing only with law violation cases under the Federal Juvenile Delinquency Act; the Act does not cover truancy or incorrigibility. Opinion, p. 34 n. 9. And it predicted that, in most cases, the juvenile would probably waive his jury trial, and the efficacy of juvenile proceedings under the Act would not be significantly interfered with by the jury trial right. *Id.*, pp. 41-42.

which a child was charged with an act which would be a felony if committed by an adult. *In re Rindell,* decided January, 1968, 2 Crim. L. Rep. 3121. Judge DeCiantis wrote:

> "Trial by jury is one of the most cherished rights of man. It was devised as the best system for arriving at the truth. . . . Jury trial, therefore, is the cornerstone of *individual liberty*. . . . Jury trials are not antagonistic to Juvenile Court proceedings . . . it would seem almost unthinkable that the Court would deprive the juvenile of the most cherished right accorded to man: an impartial trial by jury." 2 Crim. L. Rep. 3122, 3125-26. (Emphasis in original.)

(c) *Privilege Against Self-Incrimination and Right to Counsel.*—Respondent has attempted to rewrite the record on the interrogation of petitioner. At two places, pp. 6 and 58 of its Brief, respondent makes assertions as to the duration of the questioning of petitioner and as to the questioning of other persons during the course of the evening which lack support in the record. Respondent also makes the extraordinary statement that when petitioner was questioned by law enforcement officials, he was not "a definite suspect." *Id.*, p. 56. In view of the fact that a dead body had been found under his bed a short time before and that the Juvenile Court probation officer had been called in to participate in interrogating him, this assertion taxes credulity beyond the breaking point. Petitioner was unmistakably the target of this investigation, and there was no excuse for not giving him the *Miranda* warnings and an opportunity to consider with his parents and counsel whether to submit to interrogation.

Respondent makes much of the claim that petitioner was not formally taken into custody until several days after his interrogation. Brief for the Respondent, p. 56. But *Miranda* is not limited to the situation in which a formal charge has been lodged or an arrest designated as such by the authorities has been made. It is designed to assure that a suspect or accused person has the opportunity to exercise his privilege against self-incrimination if he chooses to do so, or to talk to the authorities if he freely and knowingly chooses to do that. Juveniles need that protection even more than adults, and in Ohio they especially need it in interrogations when a formal charge has not been brought. The Supreme Court of Ohio has held—in a case involving another tandem interrogation of another juvenile by the prosecuting attorney and the same Juvenile Court probation officer involved in the present case—that the duty to take a juvenile "directly before the Juvenile Court" under § 2151.25 of the Juvenile Code applies only when there is a formal charge lodged against the juvenile. The Court said:

> "It does not apply nor would it be practicable to apply it to every juvenile picked up for interrogation by the authorities. In this case, defendant was picked up in the first instance for questioning in relation to the murder of the deceased; he was not then charged with any offense, and absent a charge, Section 2151.25, Revised Code, is not applicable." *State* v. *Carder*, 9 O.S.2d 1, 222 N.E.2d 620, 627 (1966).

This permissive approach to interrogation of juveniles makes it advantageous to law enforcement officials not to lodge a charge against a juvenile, in order that they may

obtain greater freedom to interrogate him. It makes all the more essential the giving of the *Miranda* warnings to assure that the juvenile is speaking freely and with due appreciation of the seriousness of the situation with which he is confronted.

(d) *Prehearing Release and Cruel and Unusual Punishment*—Contrary to the apparent belief of respondent and the National Council, we do not urge a right to release on money bail as the sole constitutional form of prehearing release. We urge either the right to bail or its substantial equivalent in the form of a right of prehearing release unless the necessity for detention is demonstrated under prescribed judicial standards.

The Ohio statute governing prehearing release, § 2151.31, is totally deficient in providing for such a right. It prescribes no standards for detention, requires no detention hearing, puts no limit on prehearing detention, requires no statement of reasons for detention by the Juvenile Court judge, and provides no remedy for judicial abuse of discretion.[13] It is "a license for aribtrary procedure" as it stands, and the National Council concedes that "appellant was treated unfairly" under it in this case. Brief of the National Council, p. 27.

The right of juveniles to be free from cruel and inhuman punishment is receiving increasing recognition in the states. In the Rhode Island Family Court, Judge DeCiantis has

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[13] It has been held that juveniles do not have the right to test the legality of their prehearing detention by habeas corpus. *State ex rel. Peaks* v. *Allaman,* 115 N.E.2d 849 (Ohio App. 1952). Adult defendants, on the other hand, can seek habeas corpus as a remedy for unlawful denial of bail. *State* v. *Bevacqua,* 147 O.S. 20, 67 N.E.2d 786 (1946).

held that when punishment is administered to a juvenile "of such nature as to shock the general conscience"—in that case confinement in an adult correctional institution in what was referred to as "the hole"—the Juvenile Court has a duty to intervene. *Rhode Island State Police* v. *Poole*, No. Z-3248 December 22, 1966. He ordered the release of a juvenile, held under such conditions, to his family.[14]

Conclusion

For the foregoing reasons and the reasons stated in Petitioner's Brief, we respectfully submit that the judgment below should be reversed.

Respectfully submitted,

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[14] The Juvenile Division of the Illinois Cook County Circuit Court has also held that a juvenile committed to a state institution has a right under the Eighth Amendment as incorporated into the Fourteenth to receive treatment, not merely custodial confinement. *In re Harris*, December 22, 1967, 2 Crim. L. Rep. 2412.